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No. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

GARY X. NELSON,

Petitioner,

-against-

WALTER D. ZANT, Warden,
Georgia Diagnostic & Classification
Center,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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J82

QUESTION PRESENTED FOR REVIEW

Whether Petitioner was deprived of his constitutional rights to a capital conviction based only on the evidence of record, to a capital conviction based on sufficient evidence of record, and to meaningful appellate review in capital cases where (a) on direct appeal, the Georgia Supreme Court affirmed his convictions and death sentence on the basis of "evidence" that is concededly not in the trial record; (b) the state habeas court then reversed his convictions because there was insufficient evidence of record; and (c) on a subsequent appeal by the State, the Georgia Supreme Court, conceding that it had misread the trial record on direct appeal, nevertheless reinstated Petitioner's convictions and death sentence in a manner that is both unsupported by the evidence and inconsistent with its earlier decision?

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PETITION FOR A WRIT OF
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COURT OF THE STATE OF GEORGIA

Petitioner Gary X. Nelson respectfully prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of Georgia reinstating Petitioner's convictions and death sentence after they had been reversed by the state habeas court.

OPINIONS BELOW

The Georgia Supreme Court has issued two conflicting opinions with respect to Petitioner's convictions and death sentence. The first opinion on direct appeal affirming Petitioner's convictions and death sentence on the basis of "evidence" that is not in the trial record is reported as

Nelson v. State, 247 Ga. 172, 274 S.E.2d 317, cert. denied, 445 U.S. 882 (1981) ("Nelson I"), attached as Appendix A. The June 3, 1982 order of the Superior Court of Butts County, Georgia ("the June 3 Order") granting Petitioner habeas relief and reversing his convictions based on insufficient evidence of record is attached as Appendix B. The more recent decision of the Georgia Supreme Court reversing the June 3 Order and reinstating Petitioner's convictions and death sentence following an appeal by the State is reported as Zant v. Nelson, 250 Ga. 152, 296 S.E.2d 590 (1982) ("Nelson II"), attached as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Georgia in Nelson II was entered on October 28, 1982. This petition for certiorari was filed within ninety days after the entry of judgment pursuant to Rule 20.2 of the Supreme Court Rules and 28 United States Code section 2101(c). The jurisdiction of this Court is invoked under 28 United States Code section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Georgia Code sections 9-11-60(h), 24-4-5, and 24-4-6, are set forth in Appendix D.

STATEMENT OF THE CASE

A. Introduction

The Georgia Supreme Court on direct appeal in Nelson I affirmed Petitioner Nelson's convictions and death sentence for

rape, sodomy and murder based on a serious misreading of the trial record. Given the State's circumstantial evidence, the central issue at trial was the identity of the perpetrator of the crimes. After correctly holding that, for the State to satisfy its burden of proving Mr. Nelson's guilt beyond a reasonable doubt at trial, "it was necessary for the state to exclude the possibility that [Alphonso] Swinton [Petitioner's one-time roommate], who also had access to the murder weapon, could have committed the murder" (Nelson I, 247 Ga. at 178, 274 S.E.2d at 323), the Georgia Supreme Court mistakenly asserted that the State had introduced "proof that the hair found on the victim could have come from [Petitioner's] arm, but could not have come from Swinton's arm" (id. at 177, 274 S.E.2d at 323 (emphasis added)). Based solely on that mistaken reading of the record, the Court concluded that the State had satisfied its burden of eliminating Swinton as a suspect.

There is no evidence whatsoever in the record that the hair found on the victim's body could not have come from Alphonso Swinton.

Consequently, the habeas court reversed Mr. Nelson's convictions because:

> [T]he Supreme Court used as a basis for affirming Petitioner's conviction upon circumstantial evidence a finding of evidence that was never presented to the jury. . . .
>
> This Court agrees with the [Georgia] Supreme Court that without the evidence to exclude Swinton, the circumstantial evidence case against Petitioner does not satisfy the Jackson v. Virginia standard of proof beyond a reasonable doubt.

June 3 Order (App. B) at 4 (footnote omitted).

In Nelson II, the Georgia Supreme Court confessed that it had misread the trial record on direct appeal in Nelson I:

> The [alleged] tests comparing Swinton's hair with that found on the victim were said to show that the hair on the victim did not come from Swinton. These [alleged] results were never introduced into evidence; instead, the record shows only that remarks concerning those [alleged] tests were made by the DA, defense counsel, and the judge during a luncheon recess outside the presence of the jury. . . .
>
> This Court acknowledges that in . . . our opinion on Nelson's direct appeal [Nelson I], . . . we erroneously recognized as admitted the [alleged] tests concerning the comparison between the hair found on the victim and that taken from Swinton's arm. These [alleged] test results were never in fact admitted into evidence.

Nelson II, 250 Ga. at 153, 296 S.E. 2d at 591.*

Thus, although the Georgia Supreme Court, the state habeas court, the trial court and the prosecutor at trial all recognized that it was necessary for the State to exclude Alphonso Swinton as a suspect as part of the State's case in chief against Petitioner, the prosecutor in fact failed to introduce the only evidence that might have been sufficient to exclude Swinton. The Georgia Supreme Court nevertheless reversed the judgment of the habeas court and reinstated Mr. Nelson's convictions in Nelson II, in a transparent and unsuccessful attempt to evade the necessary consequences of its own decision in Nelson I.

B. Procedural History

After at least two previous grand juries had failed to indict, and 20 months after the crimes were committed, Mr. Nelson was finally indicted for the offenses of murder (Ga. Code Ann. § 26-1101), rape (Ga. Code Ann. § 26-2001), and aggravated sodomy (Ga. Code Ann. § 26-200) of Valerie L. Armstrong.

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* The relevant portion of the trial record is quoted infra at pp. 11-12.

On February 29, 1980, after a jury trial before Judge Frank S. Cheatham, Jr., in the Superior Court of Chatham County, Georgia, Mr. Nelson was found guilty of all charges. On March 14, 1980, the trial court sentenced Mr. Nelson to death on the murder conviction (see Ga. Code Ann. § 27-2534.1(b)(7)), and to two consecutive life sentences on the rape and sodomy convictions.

On direct appeal in Nelson I, Mr. Nelson's convictions were affirmed on the basis of evidence that was not in the record. On October 5, 1981, this Court denied a petition for a writ of certiorari, with Justices Brennan and Marshall dissenting. 454 U.S. 882 (1981).

Mr. Nelson then filed a petition for a writ of habeas corpus containing numerous claims for relief in the Superior Court of Butts County, Georgia. On February 25, 1982, in response to a joint motion by Mr. Nelson and the State, the habeas court directed that Mr. Nelson's claim for relief under count one of the habeas corpus petition -- the count addressing the Swinton issue -- be severed, heard and determined prior to discovery and a hearing on the remaining counts. After receiving briefs and conducting a hearing on that count, Judge R. Alex Crumbley entered the order granting the habeas petition and reversing the convictions for rape, sodomy and murder on June 3, 1982.

The State appealed. In Nelson II, the Georgia Supreme Court reversed the judgment of the habeas court.

C. Statement Of Facts

The Georgia Supreme Court in both Nelson I and II, the state habeas court, the trial court and the prosecutor all concluded, and it is evident from the facts introduced at trial, that it was necessary for the State to exclude the reasonable

hypothesis that Alphonso Swinton committed the crimes in order for the State to prove that Petitioner Nelson was guilty beyond a reasonable doubt.

Alphonso Swinton and Gary X. Nelson shared a house on 53rd Street in Savannah, Georgia, about half a block away from the victim's house. T. 180-82.* Swinton initially rented the house. T. 426-27. Mr. Nelson moved in later and shared the house with Swinton for five to six months (T. 426), until late January 1978 (T. 346) when Swinton moved out (T. 426). Swinton, however, continued to frequent the house (T. 182, 347-48, 426-27), and the record itself demonstrates that he was seen there only a week before the victim disappeared. T. 426-27.

Six-year-old Valerie Armstrong disappeared on February 19, 1978. The police found her body in a ditch in a wooded field some distance from her home the following afternoon, raped, sodomized and dead of a stab wound. T. 232-33, 240, 261, 292-93.

The victim's stepfather, Ray McCray, had first noticed that she was missing on Sunday, February 19, around 7:00 p.m. T. 185-86. The family searched for her in the neighborhood (T. 186), and that evening the victim's sister asked Sabrina Williams (who was eight years old at the time of the crimes and ten years old at trial) if she had seen the victim. Sabrina did not say she had seen the victim that day. T. 309-10. Mr. McCray reported Valerie missing to the police around 10:30 p.m. T. 206, 214, 228-29.

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* The trial transcript is designated by a "T" followed by the page number.

Three days later, at a police interview, when Sabrina was "scared" (T. 322) and (according to the police officer who interviewed her) "very nervous because of her age" (T. 327), Sabrina for the first time said that she had gone to the store with the victim to buy some candy on February 19. T. 301-03, 325-26. Sabrina testified at trial that on the way back from the store the victim left Sabrina to go to what the victim referred to as her "uncle's house" to get money to buy candy. T. 304-05. Sabrina testified that that was "Al's house," referring to Alphonso Swinton. Id. According to prosecution witness Patricia Brown, Swinton's girlfriend, Swinton encouraged the neighborhood children to come around by leaving candy around the house. T. 353-54.

At a pretrial hearing on August 30, 1978 (T. 321), Sabrina testified that she saw the victim go into the back yard on February 19, but did not see anyone else:

> Question, "Whose back yard was she in?"
>
> Answer, "She was in Al's back yard."
>
> Question, "Was there anybody else in the back yard?"
>
> Answer, "I don't know. I ain't looked in the back yard."
>
> Question, "Did you see anybody before you left?"
>
> Answer, "No, I didn't look in there."
>
> Question, "Other than Valerie?"
>
> [Answer,] "No, nobody else."

T. 320. Sabrina changed her testimony at trial, where she testified that she saw a man in the backyard, dressed in black. T. 305.

Upon seeing Mr. Nelson at trial, however, Sabrina testified that he was not the man she claimed to have seen in the back yard. T. 324. She testified on three separate occasions at trial that she did not see that person in the courtroom. T. 312, 315, 321.

However, in an effort to impeach its own witness, the prosecution then introduced the fact that at the February 22 interview (when she was "scared" and "very nervous"), Sabrina had selected a picture as possibly representing the person in the backyard. She was not sure that the person in the picture was the person in the yard: "No, I wasn't sure, 'cause it might have been another person" (T. 314); "I really wasn't sure, but it looked like him" (T. 318); "I wasn't sure" (id.); "No, I wasn't sure." Id. Through the testimony of a police officer who had conducted the February 22 interview, the prosecution established that the picture was of Petitioner. T. 328.*

Mr. Nelson worked on his car in his backyard with the victim's father on Sunday afternoon, February 19. Michael Armstrong, the victim's brother, testified that he went to Mr. Nelson's house on February 19 at dusk to lend him a drop cord so that he could continue working on his car after dark.

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* Even disregarding Sabrina Williams' age and the inconsistencies in her identification testimony, the circumstances under which she is supposed to have seen Mr. Nelson in the backyard render her identification highly suspect. According to The Old Farmer's Almanac 38, 62 (1978), sunset in Savannah occurred at 6:20 p.m. on February 19, 1978. Although Sabrina testified that it was "almost dark" when she and the victim left Sabrina's grandmother's house to go to the store (T. 317), it was 7:10 p.m. when Sabrina left Valerie and entered her grandmother's house to watch The World of Walt Disney, which began at 7:00 p.m. and was already in progress. T. 307, 316. Therefore, it was completely dark by the time that Sabrina, from a vantage point on the opposite side of the street, is supposed to have been able to recognize Mr. Nelson as a man in the back yard of "Uncle Al's house."

Michael knocked on Petitioner's door but there was no answer. He looked in the backyard but there was nobody there. Michael returned home where he saw the victim in her own backyard with another girl. T. 221, 223, 225-27.

The police found a broken knife handle wrapped in masking tape and a blade about 15 to 17 feet from the victim's body. T. 247-48. The police pieced the knife together, photographed it for identification (T. 247, 263), and then removed the tape to search for fingerprints on the handle. T. 246, 259. The police found no fingerprints on the tape, handle, or blade. T. 260. The prosecution introduced no evidence that the knife matched the victim's wounds. It did, however, attempt to link the knife to Petitioner.

The only such affirmative evidence was the testimony of prosecution witness Patricia Brown, who had been Alphonso Swinton's girl friend for over twelve years and was Swinton's girlfriend at the time of trial. T. 345-46, 355. She testified that she had "visited" Alphonso Swinton when he was living in the house on 53rd Street through January 1978. T. 346-47. At trial two years after the crimes, Ms. Brown identified a photograph of the knife that the police had pieced together. She stated that the photograph resembled a knife -- which she recalled was not sharp -- that she had once used at the 53rd Street house to cut chicken for Swinton. T. 348-49.*

When asked to identify the last time she had seen the knife before the victim disappeared, Ms. Brown testified, "It had been a while, 'cause I hadn't been over there [to the 53rd Street house] in a long, long time." T. 349. Thus the Georgia

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* Ms. Brown did not examine the actual knife at trial.

Supreme Court correctly ruled in Nelson I that the evidence showed that Swinton "also had access to the murder weapon." 247 Ga. at 178, 274 S.E.2d at 323.

A serologist employed by the State Crime Lab in Atlanta testified that a semen sample taken from the victim's coat came from a man with type O blood. Forty-four percent of the population, including Petitioner, have type O blood. T. 362-64, 369. The serologist testified that she could have conducted a further test on the semen sample that could have eliminated Mr. Nelson as a suspect, but she failed to conduct that test. T. 375-76. The prosecution introduced no evidence concerning Alphonso Swinton's blood type.*

The prosecution also called Roger Parian, an employee of the State Crime Lab in Savannah, to testify as an opinion witness about a single hair found in "the vagina area" of the victim. T. 256. Parian testified that the hair was "similar" (T. 342) to a hair taken from Mr. Nelson's forearm and "could have come from" his forearm (T. 340, 342 (emphasis added)). Parian acknowledged that the hair also could have come from at least 120 other people in Chatham County at a "minimum." T. 343. Because simple hair analysis under a microscope is a very inexact process (T. 341-43), Parian conceded that this was an "[o]ff-the-wall" figure that "wouldn't be very accurate," and that the actual number could be even higher (T. 343). See also T. 338 ("It [microscopic hair analysis] is not a process in which you can identify a person as having produced a certain hair . . . .").

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* However, in colloquy before the trial judge outside the presence of the jury, the prosecutor stated that Alphonso Swinton also has type O blood. T. 268-69.

The prosecution introduced no evidence as to whether the hair could have come from Alphonso Swinton.

Both the prosecutor* and the trial court recognized that the State's evidence implicated Alphonso Swinton as much as it did Mr. Nelson, and that therefore the State had the burden of excluding Alphonso Swinton as a suspect in order to establish Mr. Nelson's guilt beyond a reasonable doubt. This is apparent from the following discussion between the trial court, the prosecutor Mr. Ryan, and Howard McGlasson, Mr. Nelson's court-appointed counsel, during a luncheon recess outside the presence of the jury:

> "(NOTE: The luncheon recess was taken at twelve-twenty p.m. and at one forty-five the following transpired outside the presence of the jury:)
>
> "MR. McGLASSON: There were [blood] samples taken of Alphonso Swinton as well as Gary Nelson, by virtue of search warrants which were issued by the Court. The samples of Gary Nelson turned out to be positive for International Blood Group B.
>
> "MR. RYAN: O, O.
>
> "MR. McGLASSON: Excuse me, O. The one for Swinton also turned out to be Blood Group O. Does the Court wish to exclude the Swington [sic] matter and leave only in the Nelson matter?
>
> "THE COURT: That's up to you. Do you want it in?
>
> "MR. McGLASSON: I think we'd better leave it in.
>
> "MR. RYAN: We're going to leave it in, for this reason, if it please the Court, that I have to bring Mike Hogan back, because Roger didn't send me . . . (unintelligible) . . .
>
> "Roger Parian also took a hair sample from Alphonso Swinton and the hair sample that he took from him could not have been the hair sample found on the body.

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* T. 332 ("Yes, sir; I intend to eliminate [Alphonso Swinton].") (remarks by the prosecutor).

"THE COURT: Well, I think - you know, as you know, your burden in a circumstantial evidence case is not only to prove guilt beyond a reasonable doubt, but to disprove every other reasonable theory of innocence, and that might be another reasonable theory that you need to disprove.

"MR. RYAN: Yes, sir. We are going to ask that it be left in. While the blood type was the same, the hair found on her vagina could not have been that of Alphonso Swington [sic].

"THE COURT: All right."

T. 268-69.

If the prosecutor had introduced such evidence concerning Swinton's hair at trial, that would have been the only probative evidence that did not implicate both Swinton and Mr. Nelson. However, as the Georgia Supreme Court conceded in Nelson II, the prosecutor failed to introduce any evidence he might have had which he characterized in this colloquy as showing that a hair found on the victim's body could not have come from Alphonso Swinton. 250 Ga. at 153; 296 S.E.2d at 591.

As a consequence, although each court below has determined that it was necessary for the State to exclude Swinton, there is no evidence in the record to exclude the reasonable hypothesis of Swinton's guilt. Thus, the evidence of record was insufficient as a matter of law to prove Mr. Nelson's guilt beyond a reasonable doubt.

D. How The Federal Questions Were Raised And Decided Below

As discussed supra, Mr. Nelson successfully moved for relief in the state habeas court on count one of his petition concerning the Swinton issue, but the Georgia Supreme Court reversed in Nelson II. In the habeas court and as appellee in Nelson II, Mr. Nelson also challenged the lack of meaningful

appellate review by the Georgia Supreme Court when it affirmed his convictions on direct appeal in Nelson I on the basis of evidence that was not in the record. After admitting that it had misread the trial record on direct appeal, but without explaining how such an error could be excused and without detailing what procedures it had adopted to prevent such errors from recurring, the Nelson II Court responded: "[W]e find meritless Nelson's contention that this Court violated the Eighth and Fourteenth Amendments by failing to provide the high standards of review demanded by those amendments in death penalty cases." Nelson II, 250 Ga. at 155; 296 S.E.2d at 593.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO A CAPITAL CONVICTION BASED ONLY ON THE EVIDENCE OF RECORD, TO A CAPITAL CONVICTION BASED ON SUFFICIENT EVIDENCE OF RECORD, AND TO MEANINGFUL APPELLATE REVIEW IN CAPITAL CASES WHERE (A) ON DIRECT APPEAL, THE GEORGIA SUPREME COURT AFFIRMED HIS CONVICTIONS AND DEATH SENTENCE ON THE BASIS OF "EVIDENCE" THAT IS CONCEDEDLY NOT IN THE TRIAL RECORD; (B) THE STATE HABEAS COURT THEN REVERSED HIS CONVICTIONS BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF RECORD; AND (C) ON A SUBSEQUENT APPEAL BY THE STATE, THE GEORGIA SUPREME COURT, CONCEDING THAT IT HAD MISREAD THE TRIAL RECORD ON DIRECT APPEAL, NEVERTHELESS REINSTATED PETITIONER'S CONVICTIONS AND DEATH SENTENCE IN A MANNER THAT IS BOTH UNSUPPORTED BY THE EVIDENCE AND INCONSISTENT WITH ITS EARLIER DECISION.

I.
PETITIONER WAS DENIED DUE PROCESS BY A CAPITAL CONVICTION BASED ON INSUFFICIENT EVIDENCE OF RECORD

In Jackson v. Virginia, 443 U.S. 307 (1979), this Court held:

> After Winship the critical inquiry on review

> of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt . . . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

443 U.S. at 318-19 (emphasis added; footnote and original emphasis omitted). Jackson reaffirmed the holding of In re Winship, 397 U.S. 358 (1970):

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

397 U.S. at 364. Cf. Beck v. Alabama, 447 U.S. 625, 638 (1980) (increased need for reliability of the guilt determination in a capital case under the Eighth and Fourteenth Amendments); Model Penal Code § 210.6(1)(f) (death penalty excluded if, "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt") (Proposed Official Draft 1962);

A. It Was Necessary For The State To Exclude Swinton As A Suspect In Order To Establish Petitioner's Guilt Beyond A Reasonable Doubt

The Georgia Supreme Court correctly held in both Nelson I and II that it was necessary for the State to exclude Alphonso Swinton as a suspect in order to establish Mr. Nelson's guilt beyond a reasonable doubt: "[F]or the state to meet its burden of proof it had to exclude the hypothesis that Swinton could have committed the murder." Nelson II, 250 Ga. at 154, 296 S.E.2d at 592. "In order for the state to prove its case against [Mr. Nelson], it was necessary for the state to exclude the possibility that Swinton, who also had access to the murder weapon, could have

committed the murder." Nelson I, 247 Ga. at 323, 274 S.E.2d at 323.

The habeas court, the trial court and the prosecutor also recognized that it was necessary for the State to exclude Swinton in order to prove Mr. Nelson's guilt beyond a reasonable doubt. As the habeas court correctly held, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' In re Winship, 397 U.S. 358, 364 . . . . [W]ithout the evidence to exclude Swinton, the circumstantial evidence case against Petitioner does not satisfy the Jackson v. Virginia standard of proof beyond a reasonable doubt." June 3 Order at 2-3 (footnote omitted); accord, T. 269 (remarks by trial court); T. 332 ("Yes, sir; I intend to eliminate [Alphonso Swinton].") (remarks by the prosecutor).

Thus the identity of the perpetrator was an essential element that the State had to establish beyond a reasonable doubt -- indeed, this was the paramount issue at trial. Because the State's evidence pointed to Swinton at least as much as to Mr. Nelson, it was necessary for the State to exclude Swinton in order to prove beyond a reasonable doubt that Mr. Nelson, and not Swinton, committed the crimes. Accord, e.g., Vachon v. New Hampshire, 414 U.S. 478, 479 (1974) (conviction reversed where evidence was insufficient to prove essential element "that appellant personally [committed the crime] or even that he was aware of the [crime] or present . . . at the time"); Griffith v. State, 124 Ga. App. 505, 184 S.E.2d 477, 478 (1971) (the State failed to establish an "essential element of the crime, that is, that [the crime] was [committed] by the defendant," because it failed to

negate another reasonable hypothesis); Ga. Code Ann. § 24-4-6;* Ga. Code § 24-4-5.**

The holdings by the Georgia Supreme Court in Nelson I and II that it was necessary for the State to exclude Swinton in order to prove its case against Mr. Nelson are authoritative interpretations of State law by the State's highest Court and are binding on this Court. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

B. The Evidence Of Record Was Insufficient To Exclude Swinton And To Convict Petitioner

In Nelson I, the Georgia Supreme Court erroneously ruled that the state had introduced "proof that the hair found on the victim could have come from [Petitioner's] arm, but could not have come from Swinton's arm." 247 Ga. at 177, 274 S.E.2d at 323. In Nelson II, the Court frankly conceded that this "proof" was "never introduced into evidence." Ga. 250 at 153; 296 S.E.2d at 591. Based solely on this erroneous reading of the record, the Court in Nelson I concluded that the State had satisfied its burden of excluding Swinton.

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* Ga. Code § 24-4-6 (formerly Ga. Code Ann. § 38-109) provides:

> To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.

** Ga. Code § 24-4-5 (formerly Ga. Code Ann. § 38-110) provides:

> Whether dependent upon direct or circumstantial evidence, the true question in criminal cases is not whether it is possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt.

The habeas court correctly recognized that "the evidence of the hair sample from Swinton was necessary to exclude the hypothesis that Swinton could have committed the crime," and that "without the evidence to exclude Swinton the circumstantial evidence case against Petitioner does not satisfy the Jackson v. Virginia standard of proof beyond a reasonable doubt." June 3 Order at 4 (footnote omitted). The Georgia Supreme Court in Nelson II nonetheless refused to accept the necessary consequences of its decision in Nelson I. Instead of affirming the June 3 Order reversing the convictions for insufficient evidence of record, the Court in Nelson II changed course. It re-read the record and isolated the following four items of equivocal, inconclusive or non-existent evidence in order to support its reversal of the June 3 Order and its reinstatement of Petitioner's convictions and death sentence:

(1) "the knife used to kill the victim came from the defendant's home";

(2) "the last time Valerie Armstrong was seen alive she was at Nelson's residence at a time that he was also present;"

(3) "Swinton had moved out of the residence some five to six weeks prior to the murder and did not subsequently frequent Nelson's residence (Nelson stated that it had been two to three weeks since Swinton had come by);" and

(4) "the hair found on the victim was consistent with and could have come from Nelson (the state's microanalyst testified that in addition to Nelson at least 120

or more people in the Savannah area could have hair similar to that found on the victim)."

250 Ga. at 154-55; 296 S.E.2d at 592. As demonstrated below, none of this evidence, taken alone or as a whole, is sufficient to exclude Swinton and convict Petitioner.

1. Swinton "Also Had Access To The Murder Weapon"

The fact that "the knife used to kill the victim came from the defendant's home" (Nelson II, 250 Ga. at 155, 296 S.E.2d at 592) is not probative to exclude Swinton, since the evidence at trial demonstrated that Swinton "also had access to the murder weapon" (Nelson I, 247 Ga. at 178, 274 S.E.2d at 323).

Viewing all the evidence relating to the knife in the light most favorable to the prosecution (see Jackson v. Virginia, 443 U.S. at 319), the prosecution established only that the knife found some 15 to 17 feet from the victim* had been seen by Patricia Brown, Swinton's girl friend for over 12 years (T. 345-46), in the house on 53rd Street a "long, long time" before the victim disappeared, while Swinton and Mr. Nelson were both living there. T. 349. Looking at only a photograph of the knife more than two years after the crime, Brown testified that she had used the knife to cut chicken once for Swinton when Swinton and Mr. Nelson were sharing the same house. T. 346-49. Although she visited the house about one week before the crimes to see Swinton, she did not find Swinton there and she did not see the

* Aside from the location where it was found, there was no evidence that this knife was the murder weapon. There was no forensic evidence of any kind that this knife caused, or even that it was physically consistent with, the victim's wounds.

knife in the house at that time. T. 347-50. Certainly if this evidence -- which the prosecutor thought was central to the State's case against Mr. Nelson (T. 649-51) -- links the knife to Petitioner, it is equally incriminating against Swinton. No evidence was presented that the knife remained in the house or in Mr. Nelson's possession after Swinton moved out. Given the evidence of record, it is equally likely that Swinton took the knife when he moved out of the house (or that he had access to it after moving out), as it is that Mr. Nelson had the knife at the time of the crimes.

Thus, the Georgia Supreme Court correctly established the law of the case* in Nelson I when it held that the evidence demonstrated that Swinton "also had access to the murder weapon." 247 Ga. at 178, 274 S.E.2d at 323. The gratuitous observation in Nelson II that "the knife used to kill the victim came from the defendant's home" (250 Ga. at 155; 296 S.E.2d at 592) therefore proves nothing.

2. Even If Mr. Nelson Was Present When Sabrina Williams Last Saw The Victim, That Would Not Be Sufficient To Exclude Swinton And Convict Petitioner

The Georgia Supreme Court asserted that "the last time Valerie Armstrong was seen alive she was at Nelson's residence at a time that he was also present." Nelson II, 250 Ga. at 154, 296 S.E.2d at 592. Assuming arguendo that this was so -- a point we do not concede in light of the contradictory nature of Sabrina Williams's identification testimony (see supra pp. 6-8)

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* See Ashe v. Swenson, 397 U.S. 436, 443-46 (1970); United States v. Oppenheimer, 242 U.S. 85, 87-88 (1916); Strauss v. Stynchcombe, 224 Ga. 859, 165 S.E.2d 302 (1968); Ga. Code § 9-11-60(h). See generally infra p. 27.

-- it hardly excludes Swinton. There is no evidence as to what transpired between the time that Sabrina Williams claimed to have seen the victim walking towards Uncle Al's house on February 19 and the discovery of the body the following afternoon. There is no evidence that the victim was killed at the 53rd Street house; indeed, her body and the alleged murder weapon were found in a field some distance away. T. 232-33, 240, 261. There is no evidence as to whether the victim was killed on February 19 or 20, or how long the victim had been dead when the police found her body at 3:00 p.m. on February 20. The prosecution failed to prove the time or place of her death, or Mr. Nelson's whereabouts at that time. Indeed, the evidence suggests that Mr. Nelson was no longer at the house at dusk on February 19, when the victim was still in her own backyard. T. 221, 225-27; see also supra pp. 8-9.

The testimony of the victim's playmate, Sabrina Williams, did not exclude Alphonso Swinton as a suspect in the crimes. Indeed, it may incriminate Uncle Al, the candy man, more than Mr. Nelson. Sabrina testified at trial that she and the victim walked to a store on the corner of their street to buy some candy the day the victim disappeared. T. 303. Because the victim had no money, on their way back from the store she left Sabrina, saying that she intended to go to Uncle Al's house to get money for candy. T. 303-04, 319. The fact that the children referred to the house as Uncle Al's house and that the victim would go to Uncle Al to get money for candy corroborates the testimony of Swinton's girl friend, Patricia Brown, that Swinton encouraged the neighborhood children to come around by leaving candy around the house. T. 353-54.

Finally, the identification testimony underlying the assertion that the victim was last seen alive at a time when Petitioner was also present is so contradictory and inconclusive as to be entitled to little, if any, weight. Although Sabrina Williams testified at a pretrial hearing that she did not see anyone else in the backyard of Uncle Al's house with the victim (T. 320-21), at trial she testified that she saw a man in the backyard dressed in black (T. 305, 326) from a vantage point across the street nearly an hour after sunset when it was completely dark. See supra p. 8. Sabrina testified at trial that Mr. Nelson was not the man in the backyard of Al's house (T. 312, 315, 321, 324), although at the earlier pretrial police photographic lineup she had selected a photograph of Petitioner that "might have been" (T. 314) the man in the backyard, but she "wasn't sure" (T. 318).

3. The Fact That Swinton Had Moved Out Of The House Was Not Sufficient To Exclude Him

The Georgia Supreme Court in Nelson II pointed out that "Swinton had moved out of the residence some five to six weeks prior to the murder." 250 Ga. at 154; 296 S.E.2d at 592. Although the fact that Swinton had moved out may have been relevant to determine in the first instance whether or not it was necessary to exclude Swinton as a suspect, the Georgia Supreme Court correctly resolved that issue when it held in both Nelson I and II that on this record it was necessary for the State to exclude Swinton. Nelson II, 250 Ga. at 154; 296 S.E.2d at 592; Nelson I, 247 Ga. at 178, 274 S.E. 2d at 323.

The fact that Swinton had moved out is not sufficient to exclude Swinton and convict Mr. Nelson. First, there is no

evidence that the victim was killed or assaulted at the house. Indeed, the fact that the victim's body and the alleged murder weapon were found in a field some distance away suggests otherwise. See supra pp. 19-20.

Second, the only evidence tending to connect the knife (and hence Mr. Nelson) to the crimes is the testimony of Swinton's girl friend, Patricia Brown, who saw the knife "a long, long time ago" at the 53rd Street house when both Swinton and Mr. Nelson were living there. Thus the State's evidence showed that Swinton "also had access to the murder weapon." Nelson I, 247 Ga. at 178, 274 S.E.2d at 323.

Third, the State's case established that even though Swinton moved out in late January 1978, Swinton continued to frequent the house with such regularity that many people thought that Swinton still lived there. For example, Ray McCray, the victim's stepfather, testified that Swinton was living in the house on February 19th, the day Valerie disappeared. T. 182. Swinton's girl friend, Patricia Brown, testified that she went to the house a week before Valerie's disappearance to see Swinton. T. 347-48. Mr. Nelson also told the police during his interview at the police station on February 25, 1978 (T. 412) that Swinton had been at the house about two weeks earlier (i.e., one week before the crime). T. 426-27. Thus the Georgia Supreme Court's remark in Nelson II that "Swinton . . . did not subsequently frequent Nelson's residence," like its assertion in Nelson I that the evidence included proof that the hair taken from the victim's body did not come from Swinton, is not supported by the record.

In fact, the police believed that Swinton was a suspect even though he had moved out. The police obtained search warrants

for, and blood and hair samples from, Swinton (T. 269), and included a picture of Swinton in the array of five or six photographs shown to Sabrina Williams (T. 272-273, 282).* The prosecutor, the trial court, the Georgia Supreme Court and the habeas court all considered Swinton a reasonable suspect whose guilt the prosecution had the burden of eliminating. T. 268-69, 332; June 3 Order at 4. It wa not until the decision in Nelson II that anyone suggested that the fact that Swinton had moved out relieved the State of that burden.

4. The Evidence Relating To Nelson's Hair Did Not Exclude Swinton

The Georgia Supreme Court's contention that "the hair found on the victim was consistent with and could have come from Nelson" (Nelson II, 250 Ga. at 154-55, 296 S.E.2d at 592) lacks any probative value to exclude Swinton. Moreover, "the state's microanalyst testified that in addition to Nelson at least 120 or more people in the Savannah area could have hair similar to that found on the victim." Id. As Roger Parian testified at trial, hair comparison "is not a process in which you can identify a person as having produced a certain hair." T. 338.** Similarly,

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* There was also another black man with a prior criminal record in the immediate area when Valerie Armstrong disappeared. His photograph, taken from police files (T. 283), was identified by Sabrina Williams as that of a man she saw on the corner next to the candy store as she and the victim were leaving. T. 276, 283, 329-30. This was only minutes before Sabrina and the victim parted company a short distance away.

** Although the trial court permitted Parian to testify as an opinion witness over defense objection (T. 336), Parian was hardly an expert on hair comparisons. His educational background was not in the fields of biology, medicine or the natural sciences, but in physics. T. 335. His title of "microanalyst" was self-assumed -- because he sometimes used a microscope in his work. T. 334. Parian's only training had been "on the job" at the crime lab branch in Savannah, but he admitted that "[w]e at the laboratory do not specialize in one particular area such as hair identification." T. 335-36 (emphasis added).

the semen sample scraped from the victim's coat came from a man with type O blood. Type O is the most common blood type, present in 44% of the population, including both Petitioner and Swinton.*

Thus, Uncle Al, the candy man, was at least as strong a suspect as Mr. Nelson, having lived in the same house at the only time that the knife was placed there by the prosecution's evidence, having befriended the neighborhood children through offers of candy, having been known as "Uncle Al" by those children, and having had the same blood type as that obtained from the sperm found on the victim's coat. T. 268-69, 304, 319, 353-55.

In sum, the record may be searched in vain for sufficient evidence -- documentary, scientific, testimonial or otherwise -- to disprove the reasonable hypothesis that Alphonso Swinton, and not Mr. Nelson, committed the crimes. The prosecution failed to meet its burden of excluding Alphonso Swinton and of establishing Mr. Nelson's guilt beyond a reasonable doubt.

II.

PETITIONER'S CONVICTIONS AND DEATH SENTENCE BASED ON INSUFFICIENT EVIDENCE OF RECORD, THE AFFIRMANCE ON DIRECT APPEAL IN NELSON I BASED ON MATTERS OUTSIDE THE RECORD, AND THE INCONSISTENT RULING ON HABEAS APPEAL IN NELSON II VIOLATED "THE MOST FUNDAMENTAL CONCEPTS OF DUE PROCESS"

In Furman v. Georgia, 408 U.S. 238 (1972), this Court held that the death penalty constitutes cruel and unusual

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* See T. 369. In colloquy, the prosecutor stated that Swinton also has type O blood. T. 268-69. Further, although it would have been possible to analyze the semen sample further to establish a more precise identification that could have excluded Mr. Nelson, no such test was performed in the State's crime lab. Rather, the police held the sample for months before bothering to analyze it; by then, only the fact that it was type O could be determined. T. 370-76. In addition, the only semen that was typed was a dried sample removed from the victim's coat. Although the State's pathologist testified that semen was present in the victim's vagina, none was removed, typed, or tested in any way. T. 376-77.

punishment in violation of the Eighth and Fourteenth Amendments in the absence of adequate procedural safeguards against the arbitrary and capricious imposition of a death sentence. See Gregg v. Georgia, 428 U.S. 153, 169 n.15, 188-89, 220-21 (1976). In an attempt to cure the constitutional deficiencies condemned in Furman, Georgia enacted a new death penalty statute premised on meaningful and principled appellate review by the Georgia Supreme Court of the evidence of record in every capital case. See Ga. Code Ann. § 27-2537(c)(2).

This Court expressly relied on the assumption that the Georgia Supreme Court would engage in "meaningful" and "responsible" appellate review of the trial record in every case "with a maximum of rationality and consistency" (Proffitt v. Florida, 428 U.S. 242, 258-59 (1976)), when this Court upheld the post-Furman Georgia death penalty statute on its face. Gregg v. Georgia, 428 U.S. 153, 195, 198, 201-02, 204-07 (1976) (plurality opinion); id. at 211-12, 222-24 (White, J., concurring); accord, Godfrey v. Georgia, 446 U.S. 420, 427-29 (1980) (plurality opinion); Enmund v. Florida, __ U.S. __, 102 S.Ct. 3368, 3394 n.46 (1982) (death sentence must be reversed where state supreme court failed to engage in meaningful appellate review of the trial record) (O'Connor, J., dissenting); Dobbert v. Florida, 432 U.S. 282, 295 (1977) (meaningful appellate review is a "crucial protection" that "is by no means perfunctory") (Rehnquist, J.).

This Court's expectation of meaningful appellate review was not realized in the present case. On direct appeal, the Georgia Supreme Court affirmed Mr. Nelson's convictions on the basis of information concerning Swinton that was never subjected to confrontation, cross-examination or rebuttal by the defendant,

and never admitted into evidence before the jury. Mr. Nelson was denied due process of law when his convictions and death sentence were affirmed on appeal at least in part on the basis of information that he had no opportunity to deny or explain. Gardner v. Florida, 430 U.S. 349, 362 (1977).*

The Georgia Supreme Court's reliance on the Swinton "hair evidence" in Nelson I was a "'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Davis v. Alaska, 415 U.S. 308, 318 (1974). Having conceded that the only evidence on which it relied to exclude Swinton in Nelson I was not in the record, the Georgia Supreme Court did not "cure" that constitutional error when it reinstated Petitioner's convictions in Nelson II.

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* It is inherent in the concept of due process that facts used against a criminal defendant must be formally introduced into evidence in open court so that the accused will have the opportunity to confront the witnesses against him, to cross-examine those witnesses, and to have his guilt determined by the jury at trial and evaluated by the appellate court based on evidence in the official record. As this Court held in Turner v. Louisiana, 379 U.S. 466 (1965):

> The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . .
>
> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

379 U.S. 472-73 (emphasis added; footnote omitted); accord, Davis v. Alaska, 415 U.S. 308, 315-18 (1974); Douglas v. Alabama, 380 U.S. 415, 418-420 (1965); Pointer v. Texas, 380 U.S. 400, 403-406 (1965) (Sixth Amendment right to confront and cross-examine witnesses made applicable to the states through the Due Process clause of the Fourteenth Amendment).

The Georgia Supreme Court in Nelson II combed the record for bits and pieces of evidence to replace the Swinton "proof" that it had properly viewed in Nelson I as critical to the State's acknowledged burden to exclude Swinton. We have shown that that effort was unavailing. See supra pp. 16-24. But the Georgia Supreme Court's attempt in Nelson II to evade the necessary consequences of its decision in Nelson I also violated Petitioner's rights under the double jeopardy clause of the Fifth Amendment, which includes a collateral estoppel component made applicable to the states under the Fourteenth Amendment. See Ashe v. Swenson, 397 U.S. 436, 443-46 (1970); United States v. Oppenheimer, 242 U.S. 85, 87-88 (1916); accord, Strauss v. Stynchcombe, 224 Ga. 859, 165 S.E.2d 302 (1968) (ruling on direct appeal is binding as the law of the case in a subsequent habeas proceeding); Ga. Code § 9-11-60(h) (formerly Ga. Code Ann. § 81A-160(h)) ("any ruling by the Supreme Court . . . in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court").

Beyond that, the Georgia Supreme Court's approach in Nelson II raises serious questions about whether the premises underlying this Court's decision in Gregg v. Georgia and its progeny remain valid. The Georgia Supreme Court's review of the record on direct appeal was unquestionably "ineffective," "arbitrary," and "cursory or rubber stamp review." Proffitt v. Florida, 428 U.S. at 258-59. And compared with the June 3 Order reversing Mr. Nelson's convictions under the authority of Nelson I, the Georgia Supreme Court's decision in Nelson II reflects "a [minimum] of rationality and consistency" and "subjective and unpredictable" review of Petitioner's convictions and death sentence by the Georgia Supreme Court. Proffitt v. Florida, 428 U.S. at

258-59. These are precisely the vices condemned as unconstitutional in Furman v. Georgia. The Georgia Supreme Court "failed properly to perform its task in this case," and this case demonstrates that the Georgia Supreme Court "is incapable of performing its task adequately in all cases." Gregg v. Georgia, 428 U.S. at 224 (White, J., concurring). To paraphrase Gregg, "It is apparent that the Supreme Court of Georgia has [not] taken its review responsibilities seriously." Gregg v. Georgia, 428 U.S. at 205 (plurality opinion). The Georgia Supreme Court affirmed and subsequently reinstated the convictions and death sentence in this case in a manner "inconsistent with the basis upon which the [Georgia] capital-sentencing procedure was upheld." Gardner v. Florida, 430 U.S. 349, 360 n.11 (1977).

The simple fact is that in Nelson I, the Georgia Supreme Court correctly viewed the Swinton "evidence" as crucial to the State's case. In Nelson II, confronted with the acknowledged failure of the State to introduce that proof, the Georgia Supreme Court struggled to cure the defect in the State's case. The prosecution was not entitled to such aid and assistance from the Court. Because "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion" (Gardner v. Florida, 430 U.S. at 358), and because of the increased need for reliability in the fact finding process in a capital case (see, e.g., Beck v. Alabama, 447 U.S. 625, 638 (1980); Gardner v. Florida, 430 U.S. at 357-62; Lockett v. Ohio, 428 U.S. 586, 604, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring)), Petitioner's convictions and death sentence should be reversed. As

the habeas court held, the Georgia Supreme Court's decision in Nelson I violated "the most fundamental concepts of Due Process." June 3 Order at 4. The Georgia Supreme Court's decision in Nelson II compounded that error by taking a fundamentally inconsistent view of the same trial record it had purportedly reviewed in careful detail in Nelson I.

CONCLUSION

For the reasons stated and under the authorities cited above, Petitioner prays that this Court grant the petition for a writ of certiorari to review the decision of the Georgia Supreme Court reinstating Petitioner's convictions and death sentence.

Dated: January 26, 1983

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No. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GARY X. NELSON,

Petitioner,

-against-

WALTER D. ZANT, Warden,
Georgia Diagnostic & Classification
Center,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this petition for a writ of certiorari upon respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first class postage prepaid, addressed to:

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Done this 26th day of January, 1983.

Richard H. Sayler

Richard H. Sayler, Esq.